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No. 93-1571

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ELIZABETH QUTB, INDIVIDUALLY AND AS NEXT FRIEND OF SABRINA QUTB, et al.,

Petitioners

v.

STEVE BARTLETT, MAYOR OF THE CITY OF DALLAS, TEXAS, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Dallas juvenile curfew ordinance improperly delegate legislative and judicial power to, and vest untoward discretion in, enforcement authorities so as to operate as an unconstitutional prior restraint on first amendment rights to freedom of speech, contravening the First Amendment to the United States Constitution as expounded in *Forsyth County, Georgia, v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2401 (1992), and *City of Houston, Texas v. Hill*, 482 U.S. 469, 466-67 (1987)?

2. Does the Dallas juvenile curfew ordinance so shift the burden of proving the non-existence of a free speech right and offer such untimely redress for inevitable restrictions of free speech rights that it unconstitutionally chills those rights and operates as a prior restraint in violation of the First Amendment to the United States Constitution as expounded in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Elrod v. Burns*, 427 U.S. 347 (1975), and *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965)?

3. Is the Dallas juvenile curfew ordinance narrowly tailored and the least restrictive means to advance concededly compelling governmental interests so as to satisfy the strict scrutiny demanded of a law that implicates fundamental rights in an equal protection challenge?

PARTIES

The participants in the proceedings below were:

Plaintiffs, Elizabeth Qutb, Sabrina Qutb, James Poe, Alan Poe, E. L., P. L., M. B., C. B., as representatives of a class of persons under the age of seventeen and of parents of persons under the age of seventeen.

Defendants, Steve Bartlett, Al Libscomb, Chris Luna, Domingo Garcia, Charles Tardy, Larry Duncan, Donald Hicks, Mattie Lee Nash, Charlotte Mayes, Glenn Box, Donna Halstead, Paul Fielding, Max Wells, Jerry Bartos and Lori Palmer in their capacity as City Council Members of Dallas, Texas; Jan Hart in her capacity as City Manager of Dallas Texas; William T. Rathburn in his capacity as Police Chief of the City of Dallas, Texas.

Elaine Hengen-Piper, attorney for the City of El Paso, Texas, and Richard Henderson attorney for the city of Fort Worth as Amicus Curarae

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STEVE BARTLETT, MAYOR OF THE CITY OF DALLAS, TEXAS, et al.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Elizabeth Qutb, Sabrina Qutb, James Poe, Alan Poe, E. L., P. L. (Juvenile) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding, November 19, 1993, and rehearing denied, January 4, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 11 F3d 488 (Fifth Cir. 1993) and is set out in Appendix B ("App B"). The opinion of the United States District Court for the Northern District at Dallas is not reported and is set out in Appendix A.

JURISDICTION

The decision of the Fifth Circuit was entered on November 19, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

ORDINANCE INVOLVED

This case involves an ordinance of the City of Dallas amending Section 31-33 of Chapter 31 of the Dallas City Code. The ordinance is contained in Appendix D.

STATEMENT OF THE CASE

The Proceedings Below

This is an injunction action brought by juveniles and their parents challenging a juvenile curfew ordinance enacted by the City Council of Dallas, Texas. By agreement the ordinance has not taken effect. The ordinance was passed by the Dallas City Council on June 12, 1991. A complaint seeking a temporary and permanent injunction against enforcement of the ordinance was filed on July 3, 1991. Trial was held on July 22-23, 1991. The ordinance was amended on June 12, 1992. A final hearing was held on July 20, 1992.

The District Court's Decision

On August 10, 1992 the District Court permanently enjoined the City of Dallas from enforcing the curfew. The Court used a strict scrutiny analysis because the Court ruled that fundamental rights were involved. The Court found that the ordinance infringed upon the juveniles' freedom of association and the freedom to move about in public places (locomotion) App. A 19-20.

The Court further found that applying the triparte test enunciated in *Bellotti v. Baird*, 443 US 662(1979), the ordinance:

1) failed to establish any peculiar vulnerability of people under seventeen to engage in crime or become victims of crime. :

2) failed to establish any inability of persons under seventeen to make critical decisions concerning their exercise of the freedoms of association and locomotion in an informed, mature manner; and

3) improperly impinged upon the parental decisionmaking role concerning the rights of persons under seventeen to exercise freedom of association and locomotion. App. A 20-26.

The Court further found the City's data and testimony concerning the incidence of crime and crime victimization failed to justify the overly broad ordinance. App. A 32-34. Specifically the Court found that the City's data showed a statistically inconsequential occurrence of juvenile crime during curfew hours.

The Court concluded that the ordinance was not adequately tailored and was not the least restrictive means necessary to achieve the laudable goal of crime reduction. The Court reasoned that the inherent vagueness in the "defenses" vested unconstitutional discretion in law enforcement authorities. App. A 30-31.

Finally, the Court found, based upon the testimony of the Police Chief of the City of Dallas, that the ordinance would be applied selectively. In conjunction with the ordinance's failure to satisfy any prong of the *Bellotti* test, the Court concluded that the ordinance constituted a violation of the equal protection clause of the Fourteenth Amendment. App. A 35-36.

<u>The City's Basis For Appeal</u>

The City challenged the District Court's decision on several broad bases:

1) Juveniles have no fundamental freedoms of association or locomotion;

2) Because fundamental freedoms are not involved, a strict scrutiny test is not appropriate;

3) The crime data adduced at trial justified the ordinance under a rational relation test; and

4) The ordinance was constructed in such a manner that its application, by the use of defenses, could not infringe upon any recognized freedom.

The Fifth Circuit's Opinion

On November 3, 1993, the Court of Appeals reversed the District Court in an opinion in which two (2) judges concurred. The third judge on the panel concurred in the result but not the reasoning of the majority. The Court discounted the District Court's analysis of freedom of association but assumed that freedom of locomotion was fundamental and, therefore, applied a strict scrutiny test. However, the Court went on to decide that the City's interest in combating crime and reducing juvenile victimization rates was of paramount importance and therefore justified the curtailment of freedoms of association and locomotion. In reaching its decision the Court specifically declined to apply a full *Bellotti* analysis. Instead, the Court reasoned that the ordinance impinged upon no protected freedoms because the ordinance was worded in such a way that the officer on the street would not arrest anyone engaged in an exercise of free speech, religious practices, or emergency travel. In so doing the Court eschewed any notion that the "defenses" were defined in such a vague manner so as to preclude narrow enforcement or that the defenses per se could not protect against infringement of fundamental rights.

Motion For Rehearing

The Plaintiff Appellees filed a Motion for Rehearing urging the Court of Appeals to reconsider its Opinion in light of the Texas Penal Code, which differentiates between enforcement "exceptions" and trial "defenses". Further, the Plaintiff Appellees finally urged the Court to reconsider its holding that the defenses made an ordinance narrowly tailored, pointing out the broad discretion vested in law enforcement officials and the untimely redress of deprivations of fundamental rights. Fully, Plaintiff Appellees urged the Panel to conduct a full *Bellotti* analysis. This Motion was denied without written opinion on January 4, 1994.

STATEMENT OF FACTS

At trial the City adduced statistics concerning juvenile crime and victimization rates. Dallas does not keep statistical information concerning either (i) the number of minors who commit crimes in public during proposed curfew hours or (ii) the number of Dallas juveniles who are victims of crime in public during the proposed curfew hours.

The City did adduce proof that juveniles commit 5% or 6% of all the crime committed in the City during a 24-hour period. A statistical survey was run of 2,600 arrests made by the Dallas Police from January 1 to May 31, 1992. During this period of time 494 juveniles were arrested during curfew hours. The statistical survey does not indicate when the underlying crimes were committed. Juveniles were arrested in public places 316 times out of the 494 occurrences. Runaways account for 60 of these arrests. Of the remaining 256 arrests 26 (or 8%) involved assaultive offenses.

Tex. Penal Code Section 2.02 reads as follows:

(a) An exception to an offense in this code is so labeled by the phrase: "It is an exception to the application of ...."

(b) The prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception.

(c) This section does not affect exceptions applicable to offense enacted prior to the effective date of this code.

Tex. Penal Code Section 2.03 reads as follows:

(a) A defense to prosecution for an offense in this code is so labeled by the phrase: "It is a defense to prosecution...."

(b) The prosecuting attorney is not required to negate the existence of a defense in the accusation charging commission of the offense.

(c) The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

(e) A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF STATE COURTS OF LAST RESORT

Six state courts of last resort have reviewed the constitutionality of juvenile curfew ordinances; four find the laws unconstitutional, and two uphold their constitutionality.

In *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992), the Iowa Supreme Court recently invalidated a nocturnal juvenile curfew on federal constitutional grounds. The court held, *inter alia*, that a juvenile curfew regulation so restricted movement that it violated the first amendment: "Whenever the First Amendment rights of freedom of religion, speech, assembly, and association require one to move about, such movement must necessarily be protected under the First Amendment." *Id.* at 183 (quoting *Ervin v. State*, 41 Wis.2d 194, 200, 163 N.W.2d 207, 210 (1968)).[1] By necessarily offering only untimely redress for violations of first amendment freedoms, the regulation unconstitutionally burdened these freedoms.

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[1] The court cited with favor a law review article noting the connection between freedom of movement and first amendment liberties. *See* Note, "Assessing the Constitutional Validity of Juvenile Curfew Statutes," 52 Notre Dame Law. 858, 866 (1977) ("Even if [freedom of movement is] not viewed as a First Amendment right, if restrictions on movement have a direct or incidental impact on other First Amendment rights, more than a rational relation to a legitimate state purpose is needed to justify the restrictions"), *quoted in City of Maquoketa*, 484 N.W.2d at 183.

Additionally, the court, citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), recognized that minors right were not automatically coextensive with the rights of adults. Even in light of this difference, the Court held the ordinance was not narrowly tailored to protect first amendment rights. *Id.* at 186.[2]

In *City of Seattle v. Pullman*, 82 Wash.2d 794, 514 P.2d 1059 (1973) (en banc), the Washington Supreme Court held a juvenile curfew ordinance unconstitutional because made "no distinction between conduct calculated to harm and that which is essentially innocent." *Id.* at 1063. The court distinguished the breadth of the ordinance before it from that imposed in emergencies to restore public order, holding that the ordinance *sub judice* had an insufficient relationship to its objective. *Id.* at 1064.

In *Hayes v. Municipal Court of Oklahoma*, 487 P.2d 974 (Okla. 1971), the Oklahoma Court of Criminal Appeals held unconstitutional an ordinance that declared unlawful "loiter[ing] or wander[ing] aimlessly upon or [sic] about the streets, alleys, or other public highways, or parks" between 12:00 a.m. and sunrise. The court held that because the ordinance "punish[ed] conduct of an individual which in no way impinges on the rights or interests of others," it swept unnecessarily broadly and thereby invaded the area of protected freedoms. *Id.* at 978. "The prohibition was "constitutionally infirm because it does not differentiate conduct calculated to harm and that which is essentially innocent." *Id.* at 979 (internal quotations omitted).

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[2] The court may have overruled *sub silentio* its decision in *Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989), in which the court held constitutional a juvenile curfew ordinance. The *Maquoketa* court attempted to distinguish its prior opinion: "Pivotal to [the] holding was this court's determination that the 'minor's right of intracity travel is not a fundamental right for due process purposes.'" *Maquoketa*, 484 N.W.2d at 182 (quoting *Panora*, 445 N.W.2d at 364). The *Maquoketa* court then found that intracity travel was so integral to the exercise of first amendment rights that a fundamental right was implicated and the statute was constitutionally infirm. The effect of the latter is to overrule the former. Even assuming the court is correct, that a right is fundamental under one amendment but not another does not affect the constitutional analysis.

The court further recognized what the Fifth Circuit did not--that the ordinance placed unconstitutionally broad discretion in the hands of its enforcers: "Effective law enforcement does not require that the citizen on the streets is at the 'mercy of the officers' whim or caprice.'" *Id.* (quoting *Brinegan v. United States*, 338 U.S. 160, 176 (1949)). The law, the court noted, was inconsistent with the American system of constitutional government: "It is difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes." *Id.* at 980 (internal quotations omitted).

The Supreme Court of Hawaii held unconstitutional a municipal curfew ordinance prohibiting persons under 18 years of age from loitering in public places between 10:00 p.m. and sunrise. The court noted a Supreme Court trend toward recognizing the full constitutional rights of minors[3] and held the ordinance unconstitutionally overbroad because it "drew no distinction between conduct that is calculated to harm and that which is essentially innocent." *In the Interest of Doe*, 54 Haw. 647, 513 P.2d 1385, 1387 (1973) (internal quotations omitted). The court found that the ordinance was not narrowly tailored to advance the underlying governmental interests, holding that "its broad sweep has the effect of inhibiting otherwise lawful conduct." *Id.* at 1388.

The Supreme Court of Wisconsin held a curfew ordinance constitutional in *City of Milwaukee v. K.F.*, 145 Wis.2d 329, 426 N.W.2d 329 (1988). The court rejected arguments that the ordinance infringed fundamental rights, relying on the ostensibly augmented governmental authority to regulate the activities of children. *Id.* at 338-39. The court held that the ordinance, which restricted juvenile activity for "only" a narrow period of the day and "only" in public places, was narrowly drawn. *Id.* at 339.

The dissent did not argue that a properly drawn ordinance could be constitutional but questioned the precision of the ordinance

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[3] The court cited *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S 358 (1970); and *In re Gault*, 387 U.S. 1 (1967).

sub judice. Quoting a Wisconsin case, the dissenter questioned whether those enforcing or applying the law would be "relegated to creating their own standards of culpability instead of applying the standards prescribed in the law." *Id.* at 342 (quoting *Milwaukee v. Wilson*, 96 Wis.2d 11, 16, 291 N.W.2d 452 (1980)). All the judges, however, like the Fifth Circuit, seemed unconcerned with the conceptual problems inherent in enforcing a curfew law in a manner that "chills" the exercise of protected freedoms and belatedly postpones vindication of these rights to the time of trial.

The Supreme Court of Illinois rejected a challenge to the constitutionality of a state curfew, holding that the law was not aimed at fundamental speech interests protected by the first amendment. *People v. Chambers*, 66 Ill. 2d 36, 360 N.E.2d 55, 57 (1976). Like the Fifth Circuit, the Court brushed aside free speech concerns, holding that the mere lack of intent to affect free speech interests justified the statutory restrictions or negated any restrictions. The court further found that the *assumption* that "when a child is at home during the late night and early morning hours, it is protected from physical as well as moral dangers," was sufficient to justify what it defined as mere time, place, and circumstance restrictions. *Id.*

II.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS AND FEDERAL DISTRICT COURTS.

The decision of the Fifth Circuit conflicts with all but one of the decisions of the United States district courts that have addressed the issue. Most recently, the United States District Court for the District of Columbia held unconstitutional a juvenile curfew ordinance identical in all pertinent respects to the Dallas ordinance. The decisions of the Fifth Circuit and the District of Columbia district court are remarkably inversely parallel.

First, while the Fifth Circuit rejected plaintiffs' argument that the ordinance as written infringed free speech liberties, the Waters court found the restriction unconstitutional, even if construed only

incidentally to impact protected speech interests. "From a First Amendment perspective, the Court cannot agree that the wholesale restriction of these juveniles' right is 'no greater than is essential' to furtherance of the District's interests." *Waters*, 711 F.Supp. at 1136 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).[4]

Secondly, the court reasoned that the law was neither narrowly tailored nor the least restrictive means of promoting a governmental interest:

> With this Act, . . . the District has chosen to address [the crippling effects of crime] through means that are stern to the point of unconstitutionality. Rather than a narrowly drawn, constitutionally sensitive response, the District has effectively chosen to deal with the problem by making thousands of this city's innocent juveniles prisoners at night in their homes.

Waters v. Barry, 711 F.Supp. 1125, 1135 (D.D.C. 1989). Unlike the Fifth Circuit opinion, which seems to hold that, once a compelling interest is established, any means of enforcement is justified, the court noted that when the government undertakes to limit fundamental rights, "it must act gingerly; it must do so in a manner that is narrowly focused on the harm at hand, as well as sensitive to needless intrusions upon the constitutional interests of the innocent." *Id.* (citing *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964) (legitimate state end "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved") (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). The District of Columbia ordinance did not satisfy this standard:

> The Act casts [fundamental] rights aside like so much

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[4] The Court further held that its analysis of the factors enunciated in *Bellotti v. Baird*, 443 U.S. 622 (1979), lended further support to its conclusion that the Act, if enforced, unconstitutionally would burden first amendment freedoms. *Waters*, 711 F.Supp. at 1137.

> straw. The Act subjects the District's juveniles to virtual house arrest each night without differentiating either among those juveniles likely to embroil themselves in mischief, or among those activities most likely to produce harm. The Act is a bull in a china shop of constitutional values.

Id. at 1134.

The court vigorously rejected the precise argument the Fifth Circuit found pivotal--that the inclusion of exceptions to a violation causes the ordinance to satisfy the "nexus" requirement of strict scrutiny:

> [I]t is what these curfews restrict, and not what they exempt, that matters most. The Act, even with its exemptions, prohibits every innocent juvenile in the District of Columbia from moving about this city as he or she pleases at night. . . . The restriction, although perhaps by its nature silent, would be massive.

Id. at 1136.[5] The court agreed that the exemptions were substantial and constitutionally significant but ruled that the Act "cannot help but 'broadly stifle' the fundamental liberty interests of thousands of perfectly innocent, law-abiding juveniles who live in or who may visit the District of Columbia." *Id.* This determination starkly contrasts with the conclusion of the Fifth Circuit that the Dallas ordinance is narrowly tailored and that "any burden this ordinance places upon minors' constitutional rights will be minimal." App. B. page 11.

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[5] Unlike the Fifth Circuit, the court was unimpressed by evidence of juvenile crime. "Although the recent arguments in this Court might suggest otherwise, the Court remains certain that the number of such innocent juveniles far exceeds the number of juveniles in this city who might be bent on nighttime crime." *Waters*, 711 F.Supp. at 1136.

The court further held that the Act violated the equal protection clause, noting that the distinction between juveniles and non-juveniles did not even rationally further the objectives, much less bear an intimate relation to the problem. Simple logic convinced the court that the Act's restrictions constitutionally were fatal:

> In order to reasonably effectuate its ends, the Act must correctly assume that those juveniles who currently leave their homes at night to engage in drug trafficking, or to engage in other illegal, violent behavior, will be deterred from doing so by the existence of a curfew law. The naivete of such an assumption is striking. Virtually everything that the Act seeks to thwart--violence, trade in illicit narcotics--is already illegal, and carries sanctions far more painful than a night of detention. Logic thus suggests that the only juveniles for whom the Act will likely have meaning will be those already inclined to obey the law. When fundamental interests are at stake, this inversion of anticipated effects renders the Act constitutionally unacceptable.

Id. at 1139.

Finally, the court held that the Act frustrated parental childrearing roles. Although the court recognized that the traditional family unit, in which parents exercise control over their children, has to some extent dissolved, the court noted that parental control still existed in "many thousands" of families in the District. *Id.* at 1137. As to these families, the court held, the Act "gracelessly arrogates unto itself and to the police the precious rights of parenthood." *Id.* Thus, the Act frustrates, rather than furthers, the parental role in childrearing. *Id.*

The District of New Hampshire twice held a juvenile curfew ordinance unconstitutional. In 1981, the court held the broad scope of the restriction was constitutionally intolerable: "[T]he conduct of the

minors not only is blameless under the law, but also may be totally innocent in nature." *McCollester v. City of Keene*, 514 F.Supp. 1046, 1052 (D.N.H. 1981), rev'd, 668 F.2d 617 (1st Cir. 1982) (allegations of complaint did not show personal stake in controversy necessary to establish Art. III jurisdiction). The court further held that the ordinance usurped parental rights, noting the existence of many situations within the purview of the ordinance in which the parent exercised reasonable control and guidance. *Id.* at 1053.

In 1984, the court held that amendments to the ordinance did not cure its constitutional defects. The court again noted the "broad range of innocent behavior" that the law criminalized, thereby infringing rights of personhood and privacy. *McCollester v. City of Keene*, 586 F.Supp. 1381, 1384 (D.N.H. 1984). The court easily found that the law impermissibly intruded on parental privacy interest in family and childrearing. "[The law] neither aids in the discharge of parental supervision duties nor qualifies as a justified usurpation of the parental role in a situation where parental control cannot otherwise be provided." *Id.* at 1386.

A Georgia district court easily found that a juvenile curfew ordinance "quite clearly" burdened, *inter alia*, free speech rights and parental privacy. *Ruff v. Marshall*, 438 F.Supp. 303, 306 (M.D. Ga. 1977). The court expressed concern over the necessary breadth of a blanket curfew provision, holding that such a law could not in any circumstance be constitutionally permissible. The means selected--the curfew--simply was not narrowly tailored to effectuate the end:

[C]urfews are constitutionally permissible only where there is some real and immediate threat to the public safety which cannot be adequately met through less drastic alternatives and where the curfew itself is tailored in duration and application so as to meet the specific crisis without unnecessary infringement of individual liberties.

Id. The court concluded that a curfew regulation could be constitutional only upon proof of an "immediate and significant threat such as pervasive rioting and looting." *Id.*

The only district court case to affirm a juvenile curfew ordinance applied an incorrect level of scrutiny and was decided prior to this Court's *Bellotti* decision. In *Bykofsky v. Borough of Middletown*, the Court took judicial notice of the "rapidly increasing crime rate among juveniles"[6] and found a rational relation between the end sought and the means chosen. *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242, 1255, 1256 (M.D.Pa. 1975), *cert. denied*, 429 U.S. 964 (1976). The court failed to recognize that the ordinance infringed upon rights fundamental to minors, instead improperly invoking the aegis of the state's police power and *parens patriae* role over minors. *Id.* at 1257-58.

The court further found that the Borough's notice procedure, requiring minors to give prior notice of the exercise of a first amendment right, did not violate the first amendment. *Id.* at 1258. The court noted, however, that the required giving of notice could not be equated with a prior restraint because no official was empowered to deny permission. *Id.*

The Dallas procedure, in contrast, does effect a prior restraint by allowing enforcement officials unfettered discretion to deny the exercise of a free speech right. Even under Borough procedure, a law enforcement official could determine that a minor's conduct did not in fact encompass free speech and take the minor into custody for violating the ordinance. *Id.* The court mischaracterized this arrest as "after-the-fact," rather than a prior restraint. *Id.* Like the Fifth Circuit, it failed to perceive that the mere granting of unfettered discretion to law enforcement officials to determine the exercise of a free speech right chills the exercise of these rights.

The court, like the Fifth Circuit, further failed to perceive the breadth of the infringement on constitutionally protected parental

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[6] Even if the court properly judicially notice the increase in crime among juveniles, it did not, and could not, judicially noticed the relative juvenile crime problem or the extent of nocturnal juvenile crime. Without some evidence of nocturnal public juvenile crime and data allowing comparison of daytime, adult, and non-public crime, the "fact" of which the court took judicial notice is meaningless.

privacy rights. The court reviewed Supreme Court precedent[7] and held, like the Fifth Circuit, that the exceptions minimized the burden. *Id.* at 1264. The *Bykofsky* court failed to recognize that the exacting demands of strict scrutiny required that the regulation be narrowly tailored and the least restrictive means of effectuating the end. The Fifth Circuit paid only lip service to these dictates.

Finally, the *Bykofsky* court rejected an equal protection challenge under a rational basis analysis. *Id.* at 1264-1266. The court selected its standard of review on the basis of its prior--and incorrect--ruling that the ordinance did not impinge on the exercise of any fundamental liberty.

The Supreme Court denied certiorari over the written objection of Justice Marshall, joined by Justice Brennan.[8] Justice Marshall stated that precedent supported the proposition that freedom of movement was a fundamental right,[9] thus invoking strict scrutiny. *Bykofsy*, 429 U.S. at 964. Marshall further reasoned that a blanket, nonemergency curfew could not survive constitutional scrutiny. *Id.* at 965.

Other courts have reviewed the constitutionality of blanket curfew provisions; most have declared the laws unconstitutional. See, e.g. *Brown v. Ashton*, 93 Md.App. 25, 611 A.2d 599 (1992); *K.L.J. v. State*. 491 So.2d 920 (Fla.App. [1st Dist.] (1991)); *City of Wadsworth v. Owens*, 42 Ohio Misc.2d 1, 536 N.E.2d 67 (Ohio Mun. Ct. 1987); *Allen v. City of Bordentown*, 216 N.J.Super. 557, 524 A.2d 478 (1987); S.W. v. State, 431 So.2d 339 (Fla. App. 1983); *In re Mosier*, 59 Ohio Misc. 83, 394 N.E.2d 368 (1978); *W.J.W. v. State*, 356 So.2d 48 (Fla. App. 1978). But see *City of Eastlake v. Ruggiero*, 220 N.E.2d

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[7] *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[8] Justice White also objected to the denial of certiorari.

[9] Justice Marshall cited *Papachristiou v. Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); and *Hagen v. C10*, 307 U.S. 496 (1939).

126 (1966) (upholding constitutionality of curfew law). *Cf. United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (upholding constitutionality of limited emergency curfew law); *Chase v. Twist*, 323 F.Supp. 749 (E.D.Ark. 1970) (same); *Davis v. Justice Court of Pittsburg Judicial District*, 10 Cal.App.3d 1002, 89 Cal.Rptr 409 (1970) (same); *Glover v. District of Columbia*, 250 A.2d 556 (1969) (same); *Thistlewood v. Trial Magistrate for Ocean City, Worcester County*, 236 Md. 548, 204 A.2d 688 (1964) (same).

III.

THE FIFTH CIRCUIT'S DECISION IMPLICATES IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW THAT THE COURT HAS NOT SETTLED BUT SHOULD DEFINITIVELY RESOLVE.

Curfew ordinances have proliferated across the nation. See *App. C.*[10] Governmental entities everywhere view the curfew as a means of solving the problem of rising crime. The purported solution is, however, merely an attempt to solve a systematic problem through an enactment that convicts the innocent, broadly stifles fundamental liberties and produces a chill over freedom of speech.

The City's curfew ordinance chills the exercise of first amendment rights and postpones the vindication of those rights until time of trial. As originally drafted, the curfew ordinance failed to provide for any hearing at all until three violations had occurred. The City voluntarily amended the ordinance in 1992. The amendment, on which the Fifth Circuit's opinion heavily relies, reads as follows:

> Before taking any enforcement action under this section, a police officer shall ask the apparent offender's age and reason for being in the public place. The officer shall not issue a

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[10]The list of cities, counties, and states is not definitive. The A.C.L.U. estimates that at least 1,000 communities across the nation have curfews in place or are considering enactment. The list was gathered from a solicitation of A.C.L.U. affiliates and a cursory Nexis search.

citation or make an arrest under this section unless the officer reasonably believes that an offense has occurred and that, based on any response and other circumstances, no defense in Subsection (c) is present.

If the presence of these defenses is meant to show the narrow scope of enforcement, the curfew is fundamentally flawed for three reasons: the curfew constitutes an unlawful prior restraint on free speech without timely remedy; the curfew vests an improper amount of discretion in the officer on the street; and the curfew ordinance improperly shifts the burden of proof.

UNTIMELY REDRESS

First, as petitioners argued before the District Court, "defenses" are not "exceptions". Tex. Penal Code §2.03 "Defense" quite clearly indicates that the exemption must be raised by evidence at trial. Since the arrest, of necessity, must precede the trial, a defense in Texas can in no way protect the exercise of fundamental rights except by deterring police abuse through acquittal. Vindication by an acquittal at trial can never make the accused whole since his "justifiable" conduct was pretermitted at an earlier occasion.

This belated relief underscores the inherent tension between this curfew ordinance and the exercise of fundamental freedoms. What differentiates this curfew from that legislation which imposes only a "minimal burden" on fundamental rights is the timeliness of the hearing. *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035 (1979), and *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), impose temporal limitations which, in the context of a nine month pregnancy, cannot impair the ultimate exercise of the contested right. In fact, the Supreme Court has emphasized the need for a timely hearing to insure that the exercise of the fundamental right is not rendered moot by delay. *Bellotti* at 3049-50; *Hodgson* at 2944.

If an enactment does not contain a temporal limitation that prevents the State from suppressing protected speech without adequate procedural safeguards, the enactment is invalid because the delay "compels the speaker's silence". *Riley v. National Federation of the*

Blind of North Carolina, Inc., 487 U.S. 781, 794, 108 S.Ct. 2667, 2680 (1988).

Since even the Fifth Circuit assumed that some fundamental rights will be impaired, the lack of timely redress precludes a finding that the curfew's burden in such cases is minimal. In fact, such lost freedoms are never inconsequential. "The loss of First Amendment freedom for even minimal amounts of time unquestionably constitute irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1975).

IMPROPER DELEGATION

Secondly, the existence of a defense is rarely applied in law enforcement circles to preclude an arrest. Instead "...[t]he eternal temptation [is] to arrest the speaker rather than correct the condition about which he complains." *Younger v. Harris*, 401 U.S. 37, 65, 91 S.Ct. 746, 787 (1971) (Douglas, judge dissenting). Trial issues, such as defenses are quite properly left to the court system to decide. Like the ordinance in *City of Houston, Texas v. Hill*, 482 U.S. 469, 107 S.Ct. 2502 (1987), this ordinance places too much discretion in the hands of even well trained police officers to curtail protected freedoms. As with the "fighting words" Houston ordinance, and as Chief Rathburn candidly admitted, the curfew "will be enforced only if no other violation is found." The ordinance is therefore "susceptible of regular application to protected expression." This type of enforcement has traditionally been condemned. *Id.* at 465 n. 15 and cases cited therein. The predicted abuse occurs because, typically, the officer is prone to arrest and, at trial, "the only witnesses will be the police officer and the youth. All that is required for conviction is the officer's testimony." This scenario is pregnant with opportunities for abuse. *Lewis v. City of New Orleans*, 415 U.S. 130, 135-136, 94 S.Ct. 970, 973 (1974).

Moreover, in district court, the city police department admitted that it had not worked out its instructions to the "officer on the street" as to how to enforce the curfew. Therefore, the opinion's conclusion that the existence of a "defense" is a sufficient protection belies the reason for the temporary restraining order. There is a substantial likelihood that the police in enforcing the curfew will cast "too broad a

net". *Houston* 482 U.S. at 466.[11] There is a "heavy presumption" against the validity of enactments that may curtail First Amendment freedoms. In determining the validity of such enforcement, this court must be wary that an ordinance not delegate overly broad discretion to the government officials. *Forsyth County, Ga v. Nationalist Movement*, 112 S.Ct. 2395, 2401 (1992). This curfew constitutes such delegation.

SHIFTING THE BURDEN

Thirdly, there is a substantial likelihood that a police officer exercising a "reasonable belief" standard will enforce the ordinance in a broader manner than the courts would permit at trial. A "reasonable belief" is a much less stringent standard than "probable cause", which in turn is a far cry from "reasonable doubt."

Texas and Federal courts have employed the term "reasonable suspicion" to mean "more than an unparticularized suspicion or hunch, but considerably less than proof of wrongdoing by preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585 (1989); *Holladay v. State*, 805 S.W. 2d 464, 496 (Tex.Crim.App. 1991).

Ipso facto, the police are authorized to enforce the curfew in a manner that guarantees that some percentage of the arrests will be invalid. In any other context, a higher standard of proof would be required before such "prior restraint" would be tolerated. The curfew is meant to act as a deterrent; one which deters minors from being in public places at night. As such, the curfew will act as a prior restraint. The exceptional nature of the review of ordinances which may regulate freedom of expression, "is based upon an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *F.W./P.B.S., Inc. v. City of Dallas*, 110 S.Ct. 596, 605 (1990).

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[11] "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained..." *United States v. Reese*, 92 U.S. 214 (1976).

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the decision below.

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